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Discursive Detours on the Route to Justice for Women

by Dr Margaret Malloch, University of Stirling

Introduction

There has been much activity within the criminal justice system in Scotland aimed at securing an approach to women in prison that is ‘radical and ambitious’; a call that was made by the Cabinet Secretary for Justice, Michael Matheson when he announced a halt to the development of a 300-bed prison for women at Inverclyde. Following his announcement, much activity was instigated as the Scottish Prison Service (SPS) and Scottish Government reviewed their plans for women, with meetings convened across the country to discuss what should happen next. There has been an admirable determination across all agencies to maintain momentum for change.

In Scotland and internationally, the deleterious impact of imprisonment on women has been widely recognised, alongside a widely shared desire to reduce the female prison population. This issue has exercised policy-makers, practitioners and academics (e.g. Carlen, 1983; Dobash et al, 1986) for many years. Ongoing attempts have been made to respond to the obstinately increasing female prison population and the severe social circumstances that many women prisoners appear to have experienced prior to their encounters with the criminal justice system (Loucks, 1997).

Given the current goodwill to grasp the opportunities that the current open landscape appears to provide, it is worth considering why it may be that despite a great deal of good will and a stated commitment to reduce the women’s prison population it remains ‘obstinately static’. This is a situation shared across the UK (and internationally) and reflected in a plethora of reviews, reports and inquiries into the imprisonment of women and potential reforms^{1, 2}. Key reports have been based on

¹ In England and Wales: Justice for Women: The Need for Reform (Prison Reform Trust, 2000); Lacking Conviction, (Prison Reform Trust, 2004); Prisons and Probation Ombudsman Report into the series of deaths in HMP and YOI Styal (2003); Corston Report (2007) as well as reports by the Commission on Women and the Criminal Justice System (2009) and ongoing follow-up reports undertaken by the Fawcett Society. In 2008, the New Economics Foundation (2008) set out an economic justification for the use of alternatives to prison. In Northern Ireland: Human Rights Commission report, *The Hurt Inside* (Scrutton and Moore, 2005) and Convery (2009) *Addressing Offending by Women for the Northern Ireland Office*. Add to this, the series of reports by HM Inspectorates of Prison for Scotland (2007, 2009, 2011), England/Wales (HM Inspector of Prisons, 1997 and 2010) and Northern Ireland; and a similar outpouring of reports and reviews internationally by both governments and organisations such as Amnesty International and Human Rights Watch.

² In Scotland, comprehensive reports by the Social Work Services and Prisons Inspectorates for Scotland (1998) and the Ministerial Group on Women’s Offending (2002) have been superseded by the Equal Opportunities Committee of the Scottish Parliament review on *Female Offenders in the Criminal Justice System* (2009) which also set out to identify underlying causes and conditions for the escalating female prison population. McIvor and Burman (2011) in a report for the Scottish Government, indicated that the female prison population was continuing to increase, largely due to the increased severity of sentencing practice; while a follow-up report from HM Inspector of Prison of HMP and

extensive consultation, evidence-gathering (written and verbal), and in discussion with women in the criminal justice system, practitioners, service providers and commissioners, representatives/leaders of key agencies and academics. Evidence has included national and international contributions which helped to locate the Scottish situation within an international context. Alongside this, academic research and analysis, evaluation and service monitoring has contributed to these key reports. Although as Corston (Corston, 2007:16) has noted: *“There can be few topics that have been so exhaustively researched, to such little practical effect, as the plight of women in the criminal justice system”*.

Basing this article on a rapid review of the key investigations into the justice system for women in Scotland, the consequences of this ‘bounded knowledge’ is considered, particularly in relation to the apparent disjuncture between ‘knowledge’ and ‘action’. Recognising the very real improvements that have been made over the years, it nevertheless considers (from a broader, structural perspective) why, despite the best of intentions from all sides, a great deal of good will, and a noticeable distance travelled, the major *problems* facing women in the criminal justice system have changed very little since the 1980s despite many changes in *practice*.

Background

In an attempt to trace the almost ‘utopian impulse’ for a transformation of the use of imprisonment for women in Scotland, a rapid review was conducted of the key policy documents produced between 1982 and 2015³. These reports can broadly be grouped as: (i) System reviews (such as reports by HM Inspectorate of Prisons for Scotland, consisting of both full and intermediary reports) aimed at improving institutional arrangements within the penal estate (ii) Inquiries and Commissions (wide-ranging reviews of the system e.g. government commissioned inquiries) (iii) Academic research. They are not entirely separate; for example academic research will be used to inform both system reviews and inquiries, and vice versa. However, the parameters of each often determine the selection of evidence and focus.

There is not space here to set out the many recommendations that have been made over time; most of the attention that has focused on women and the criminal justice system in Scotland has focused on the problems of custody and, related to that, suggestions to improve practice in prison. Successive reports by HM Inspectorate of Prisons for Scotland have identified specific problems, many of which have been addressed and/or resolved over time. For example, during the 1990s, the absence of an open estate for women, lack of appropriate educational opportunities for women in prison, the need to address the specific ‘needs and aptitudes’ of women and calls for

YOI Cornton Vale was highly critical of the conditions experienced by women prisoners, resulting from the significant overcrowding in the prison (HM Inspector of Prisons for Scotland, 2011).

³ From Carlen’s report to the, then, Scottish Office – to the recent reports published in 2015 (Scottish Prison Service, IRISS). It is noted that different forms of knowledge production have different status and accordingly recommendations made have different weight and authority attached to them.

consideration of small local units (referring specifically to Aberdeen, Inverness and Dumfries) were highlighted (for example HM Inspectorate of Prisons for Scotland, 1997). Issues such as training opportunities for women, visiting arrangements and ongoing concern about medical care (especially in relation to psychiatric and psychological problems) have featured consistently in Inspectorate Reports throughout the 1990s and 2000s.

A series of reports were produced following the deaths of seven young women within a 30 month period at HMP and YOI Cornton Vale, beginning with the Social Work Services and Prisons Inspectorates report (1998) *Women Offenders: A Safer Way*. Drawing upon research commissioned for the review (Loucks, 1997) the report highlighted particular concerns for drug users as a direct result of the deaths in Cornton Vale and a recognition of the high number of problem drug users who were repeatedly incarcerated. This review went beyond the confines of the prison with most of the recommendations of the Inspectorates directly aimed at: increasing services to support the use of bail; reduce fine default; inter-agency co-operation to address key issues; tailoring social work services to meet the needs of women; separate collation of statistics/data on women; and an end to the use of prison custody for under-18s⁴. Arguing that there should be more options for sentencers within the community, and fewer available prison places would, the Inspectorates suggested, reduce the prison population at Cornton Vale to “100 or less on a daily basis by the end of the year 2000” (1998: 53).

A Ministerial Group on Women’s Offending, established to take forward these recommendations, produced an up-dated report *A Better Way* in 2002, which considered ways of keeping women out of prison, reflecting on recommendations made by a dedicated Inter-Agency Forum⁵ through: prevention and early intervention (including responses to prostitution, use of arrest referral, diversion, bail and particular circumstances of young women); and community disposals (supervised attendance orders, structured deferred sentences, drug treatment and testing orders, drug courts, restricted liberty orders, a ‘time-out’ centre (later to become the 218 Centre; plans for roll out across the country did not come to fruition, see Malloch et al, 2008), and specialised services for women and specifically younger women). Aftercare provisions and the importance of facilitating access to community based services in relation to substance misuse, accommodation, employment and training, education, benefits and finance, health-related needs were highlighted. The average daily female prison population at this time (2002) was 201.

In 2009, the Scottish Parliament Equal Opportunities Committee produced their report *Female Offenders in the Criminal Justice System*, which again focused upon the quality of mental health care for women in prison; argued that more provisions for

⁴Recommendations that have continued to feature in more recent reports.

⁵ Which also produced annual reports detailing progress made – and where progress had not been made (e.g. Inter-Agency Forum, 2001).

short-term and remand prisoners were required (especially in relation to literacy and numeracy skills) and called for a speech and language therapy programme to be piloted. As with previous reports, the Equal Opportunities Committee called for consideration to be given to statutory support for women on short-term sentences on release; increased support for children of prisoners; improvement of visitor facilities and more action to stop the circulation of drugs in prison. It also considered sentencing, alternatives to imprisonment, prevention of re-offending, gender equality duty and leadership in relation to the provision of services for female offenders.

In 2012 the Commission on Women Offenders collated extensive evidence on women in the criminal justice system which was distilled into its published report. Recommendations were wide-ranging and covered ‘service redesign’ in the community (Community Justice Centres, multi-disciplinary teams and key workers, intensive mentoring, supported accommodation, national service level agreement for the provision of psychiatric reports, development of mental health services to address the needs of women with personality disorders, mental health training for criminal justice professionals). The Commission also made recommendations in relation to alternatives to prosecution (fiscal work orders, new powers for Procurators Fiscal in relation to composite diversion orders, new powers for police to divert women to community justice centres with conditional cautions); and alternatives to remand (bail supervision plus, further examination of electronic monitoring as a condition of bail, the need to ensure communication and awareness of alternatives to remand in custody).⁶

Other areas which the Commission considered and made recommendations on were sentencing (pilot a problem solving summary criminal court, rapid criminal justice social work reports, subsequent progress review hearings, introduction of composite custody and community sentence, and suspended sentences, training for Judicial Studies Committee) and leadership/structures/delivery (establishment of a national Community Justice service, National Community Justice and Prison Delivery Board to promote integration between SPS and the community justice system, each key agency to appoint a senior director with responsibility for women, and requested annual reports on implementation by the Cabinet Secretary for Justice).

A number of recommendations of specific relevance to the prison were also set out including the reiteration of previous concerns about links between mental health programmes and interventions in prison and the community, use of remand, staff training and significantly a call to replace Cornton Vale with a smaller, specialist prison.⁷

⁶Echoing many concerns raised previously.

⁷A call previously made by Carlen in 1982 on the basis that most women could be more appropriately dealt with by non-custodial measures; the minority of women who merited secure custody could be held in a small unit; and an open unit should be provided for long-term female prisoners

SPS were proactive from the outset, commissioning Reid Howie Associates (2012) to chair a series of meetings across the country intended to consider the Commission Recommendations (specifically the six recommendations that were addressed to the prison). Earlier this year, the Scottish Prison Service held an international symposium which considered how to best move forward following the decision not to proceed with plans for HMP Inverclyde, producing a report, *From Vision to Reality: Transforming Scotland's Care of Women in Custody* (SPS, 2015)⁸. In response to the Commission on Women Offenders' (2012) recommendations on community provisions, mentoring schemes have been implemented across the country and community justice services established (recently evaluated by IRISS and reiterating the challenges of short-term funding as well as highlighting good practice (Dryden and Souness, 2015)).

Discussion

International evidence shows that attempts at penal reform are limited when proposals are partially implemented, particularly those which depend upon enhanced community provisions **and** a reduction in prison places. The proposed closure of Cornton Vale and its replacement with smaller units across the country has noticeable parallels with Canada following the closure of Kingston Prison for Women (also deemed 'unfit for purpose') and its replacement with smaller institutions (Correctional Service Canada, 1990). Hannah-Moffat and Shaw (2000) and Hannah-Moffat (2001 and 2008) highlight the ways in which policies aimed at enhancing the circumstances of women within the criminal justice system are highly vulnerable to distortion and manipulation in the process of implementation and practice (see also Malloch et al, 2008).

SPS has made deliberate attempts to address criticisms made of the penal estate and appears to have made improvements when it was within its power to do so. The speed with which SPS led the debate on alternatives to the proposed HMP Inverclyde was noticeable. By comparison, in terms of community provisions, the fragmentation of community resources and the different policy areas that come under the remit of various systems have implications for the potential of 'joined-up' approaches to tackle the key problems facing women more broadly. This is an area worth exploring when considering why many initiatives are proposed but either not implemented, or only partially so.

Adopting three key frames (broadly adapted from Mathieson, 2004): - boundary-setting; implementation dilution, and offsetting the radical – provides a structure through which to consider the ways in which attempts to achieve 'radical and ambitious change' can become distorted and limited. Each frame is briefly discussed in turn:

⁸ The Soroptomist International (SI) and Prison Reform Trust (PRT) review of women's imprisonment across the UK, *Transforming Lives: reducing women's imprisonment* was published in 2014.

Boundary setting

There is ample evidence to illustrate that many women in the criminal justice system, and specifically those who end up in prison, have significant experiences of poverty, problematic drug and alcohol use, mental health problems, abuse, violence and bereavement. This is reflected in many of the recommendations which focus upon responding to women's 'needs' within the context of the criminal justice system, either through programmes and interventions in prison, or in specifically devised services for 'women offenders' in the community. Despite widespread acknowledgement of the significance of social problems (poverty and inequality) in relation to women's criminalisation, enquiries have consistently focused upon the penal context; even though most people involved recognise the limitations of addressing social justice issues via the criminal justice system (Carlen, 2008).

McIvor and Burman (2011) report that women do not appear to be committing more serious offences but are receiving more severe sentences than previously. It is increasingly acknowledged that the circumstances of disadvantage which feature in the lives of many women (individualised as 'criminogenic factors') who are drawn into the criminal justice system may contribute to their criminalisation. Recognising this, Soroptomists International (2014) have recommended improvements in policing and sentencing practices in relation to women. However, until attention is turned **outside** the criminal justice system, it is likely that the circumstances of the women who come **into** it, is unlikely to change. Notably, there have been some attempts to address this through policies aimed at 'social inclusion', improved support to access to benefits on release from prison, inclusion of Welfare Rights workers in services for women, and mentoring aimed at linking women into mainstream services and ensuring they are able to obtain benefit entitlements. Alongside this there is ongoing attention to effective through-care provisions; a feature of all previous reviews into the justice system for women. However, the challenges of securing effective through-care provision in Scotland continue (Malloch, 2013; Dryden and Souness, 2015). In essence, the bounded knowledge of criminal justice isolates a problem that is much more generic.

Implementation dilution

While the prison is generally viewed as a static feature at the centre of criminal justice policy, the implementation of resources in the community is fragmented and too often short-term. Similarly in Canada following the closure of the Kingston Prison for Women, the Expert Committee (2007) concluded that more focus was required to build community capacity and increase creativity at grass-roots level: "*The Committee is left with the impression that there is a lack of co-ordinated effort on the community side relative to what we have observed at the institutions*" (Expert Committee, 2007).

Although there has been significant investment in community provisions in Scotland, funding that is often provided in two year cycles can cause considerable uncertainty

for workers and service-users alike, allowing little time for services to continue beyond a set-up and pilot phase. Short-term interventions are generally unable to evidence longer-term impact (Loucks et al, 2006; Easton and Mathews, 2010 and 2011; Burgess et al., 2011, Hedderman, 2008; 2011; Dryden and Souness, 2015). ‘Alternatives’ which are suggested as significant innovations within the system are often absorbed into it in a way which softens them yet at the same time, deflects the initial critiques within which they originated. This process can also impede the transformation from short to long term goals.

There have been many recommendations aimed at sentencing practice; both in terms of the contribution that changes to sentencing practice could have on reducing the female prison population. One of the key issues identified consistently, has been the need to ensure that sentencers are aware of community-based options and have some confidence that they are effective. Again, some important developments have been made in this area. The impact of Supervised Attendance Orders and the use of Home Detention Curfews have contributed to reductions in the number of women in prison with consideration of the use of remand as ongoing.

Problematically, debates too often become formed around resources for women as ‘offenders’ rather than directed towards reducing, or abolishing, the prison. Within this context, any call for closure of the women’s prison is met with a ‘taken-for-granted’ claim that ‘something needs to be done about criminal women’. The focus is retained on criminal justice solutions, or as Sim (2009: 155) has noted “(...) whenever a crisis has erupted, the prison has ‘always been offered as its own remedy’ to its problems”

Offsetting the radical

“Any report on Cornton Vale must take into account the desperate state in which most of the prisoners are when they arrive at the prison gate. (...) “No-one who has not been in Cornton Vale can grasp the amount of pain that is hidden behind its fence. No-one who has been in Cornton Vale can forget it”. HM Inspectorate of Prisons for Scotland (2006).

A central recommendation from the Social Work Services and Prisons Inspectorate (2008) was that an expansion of community provisions should be accompanied by a cap on prison places. This was intended to ensure that community resources were used in place of custody thus avoiding potential problems of ‘net-widening’ where increased numbers of women were drawn into the criminal justice system to access resources that were problematically absent in local communities. This cap has never been introduced (see Tombs, 2004). Updates on the implementation of the Transforming Rehabilitation agenda in England and Wales have also noted concerns that more women may be drawn into criminal justice system and kept there for longer (All Parliamentary Group, 2015).

More broadly, the current international context is one of the ‘globalised destruction of social safety nets’ and within this context, individualising structural inequalities. Recommendations focused on the criminal justice system can result in improved services within it, but will not reduce the problems that bring women (or men) into it. The deeper social structures of society sustain the social marginalisation and disadvantage that underpin the real experiences of men and women who encounter the prison population. These issues are often seen as too overwhelming and ingrained to tackle outwith the organisational remit of reform. Calls are made instead to increase provisions in the community via criminal justice. At the same time, the ‘community’ is an ambiguous and contested concept that is not unproblematic for either women, or provisions for women. In this context ‘community’ is often assumed or presented as a solution without any real analysis of what it is or how it is gendered (Malloch et al, 2014).

Final comments

While the prison population has increased, attempts to enhance community disposals have continued although without evident success in reducing the female prison population significantly. Consistent features of all the reports and enquiries into women in prison in Scotland have identified the need for appropriate mental health facilities and provisions for problem drug users in prisons which are linked into the community; appropriate education and training; reduction of use of remand and short-term prison sentences; improved access to/for families and provisions for visitors which cater for children. All have highlighted the need to develop resources in the community and to ensure effective transitions between prisons and the community. All have indicated that the female prison population could be reduced significantly without detriment to the safety of local communities.

Many recommendations have been implemented and improvements made to enhance and improve the custodial experience for women prisoners. How can we ensure the current enthusiasm for radical and ambitious action does not dissipate? This requires working beyond the criminal justice system, recognising the limitations of criminal justice agencies to secure change in isolation and harnessing the political momentum to work towards more radical and far-reaching reform through addressing the inequalities and disadvantages that are features of many local populations where ‘communities’ have been fragmented. It also requires ensuring that when radical interventions are proposed, they are able to retain that radical potential; challenges we have seen in Scotland, as indicated above, but also elsewhere following Corston (2007) and Correctional Service Canada (CSC, 2009) where strategies for change, and the innovations within them, have been diluted.

Finally, it is the broader structural issues, social, political and economic, that determine the throughput of the criminal justice system and thus any attempt at reform which does not address this will necessarily be limited. It is important to challenge the ‘uplifting liberalism’ for those at the top of the social structure, and

‘punitive paternalism’ for those at the bottom (Wacquant, 2012). Despite the limitations placed on many of the radical reforms proposed over the years, developments in Scotland are admirable within an international context and do create a space for optimism. Nevertheless, as Sim (2009) highlights, liberal reform groups have had limited success in making fundamental changes to dominant penal discourses, and for women, this can often serve to reinforce the coupling of penal and welfare governance. Current developments across the UK have highlighted the tendency to integrate prison and community penalties, and in doing so, the wider social context can remain obscure and unchallenged.

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